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REDACTED – FOR PUBLIC INSPECTION

August 8, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch:

Attached for filing in the above-referenced dockets, please find an original plus four copies of Qwest Communications International Inc.'s **PUBLIC REDACTED** Comments. Also attached is an additional copy of the Comments to be file-stamped and returned to me.

In accordance with the Commission's July 9, 2007 *Public Notice* in these dockets, I am including another copy of these Comments for delivery to Best Copy and Printing, Inc. Furthermore, the **CONFIDENTIAL UNREDACTED** version of these Comments is being filed under separate cover.

Please do not hesitate to contact me with any questions regarding this matter.

Sincerely yours,

WILKINSON BARKER KNAUER, LLP

Russell P. Hanser

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ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
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To: The Commission

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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SUMMARY

The passage of time has borne out the predictive judgments upon which the Commission based its *Pricing Flexibility Order*. Competition in the high-capacity transmission market is already widespread and growing rapidly. With new wireless and cable competitors already providing service and positioned to make substantial further inroads, the high-capacity transmission market, and the wireless backhaul market in particular, has the potential to grow exponentially in the coming five years. Not surprisingly, special access rates are falling quickly. Qwest's and other incumbent LECs' revenues per increment of special access service sold has fallen substantially since pricing flexibility was implemented, and consumers have benefited from increased facilities deployment. The pricing flexibility regime should be preserved, and in some ways expanded.

Because the Commission's analysis of the pricing flexibility rules is fundamentally an inquiry into the state of competition, it must be undertaken in the context of recent precedent from the federal courts and the Commission in analyzing telecommunications competition. These pronouncements emphasize the importance of relying on markets to the extent possible, and recognize that imposing regulatory prices in a competitive environment is fraught with danger. The precedent demonstrates that the Commission must account for *all* sources of competition to incumbent LEC special access offerings, including intermodal alternatives. Recent decisions also have made critical findings regarding the ease of entry into the market for special access services, which cannot be disregarded. Finally, the cases show that the Commission may not make a static assessment of the market; rather, it must take a longer view of competitive developments, including an assessment of nascent and potential competition, in addition to actual existing competition.

The data show that the high-capacity transmission market is already highly competitive and is becoming more so all the time. The Commission has already seen substantial data in this proceeding regarding the growth of intramodal competition from competitive LECs and other wireline providers, as well as from certain intermodal competitors such as cable providers. According to a study of enterprise users, approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of all retail wireline DS1 and DS3 links in Qwest's region are provided by competitors. But the most significant new data available at this time comes from the wireless sector, where microwave and WiMAX are poised to win considerable market share from incumbent LECs' special access offerings. In Europe, these wireless alternatives have already captured a majority of the wireless backhaul market. In coming years, they are likely to do so in the U.S. as well. New providers such as FiberTower are beginning to compete aggressively for wireless backhaul and other point-to-point, high-capacity transport traffic, and Sprint has announced plans to leverage its extensive Broadband Radio Service holdings for backhaul purposes – which it presumably could sell to other wireless carriers in addition to its own use. All indications are that competition for special access services – already strong – is primed to explode in the coming years.

The wireless sector is particularly important here, because much of the recent attention paid to special access rates has resulted from the complaints of wireless carriers. These providers' unprecedented market success, however, belies any assertion that they have been hindered by special access prices. By any measure, the wireless sector has thrived in the twenty-

first century, now outstripping the wireline sector in terms of subscribers and minutes of use. Most significantly, wireless carriers have continued to build new cell sites at a pace even faster than during the original deployment of PCS spectrum. In many instances, they have connected these new cell sites using incumbent LEC special access circuits, and have generated record profits while doing so.

The data do not reflect any evidence of supracompetitive prices or profits in the high-capacity transmission market. Incumbent LECs such as Qwest are earning substantially less per increment of special access service sold than they did before pricing flexibility was implemented. Because the vast majority of customers receive volume or term discounts, or buy services out of individualized contract tariffs, the generally available short-term tariff rates often cited by critics are not particularly illuminating in analyzing special access rate levels. Similarly, neither ARMIS data nor cost model outputs are useful for analyzing special access prices.

In light of the extensive competition and falling prices in the high-capacity transmission markets, the Commission should feel very comfortable with the predictive judgments it made in 1999. The facts present no basis for any re-regulation of special access services. In fact, the competitive situation warrants further deregulatory steps. The Commission should first modify its definition of the relevant product market to account for the growing number of links between diverse networks, the relevance of intermodal competition, and the ease with which carriers can self-deploy or otherwise procure OCn-capacity facilities. Given the Commission's express findings that OCn-capacity services are suitable for competitive provision on a nationwide basis, the Commission should also extend universal Phase II pricing flexibility to these services. Finally, given the oft-cited benefits of open negotiation, the Commission should extend Phase I pricing flexibility to all special access services in all MSAs, safe in the knowledge that these services will (to the extent they are not eligible for Phase II relief) remain available at tariffed rates and terms.

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To: The Commission

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

INTRODUCTION

Parties alleging substantial changes in the high-capacity transmission markets since the Commission last sought comment in this docket are correct. Fiber-optic deployment has skyrocketed in the wake of Commission decisions designed to spark infrastructure investment, and cable providers have set their sights squarely on the enterprise and wholesale markets. Most striking, though, has been the remarkable rise of fixed wireless providers. These companies are using microwave spectrum and WiMAX technology to provide competitive point-to-point carriage. They offer efficient, next-generation alternatives to wireline DS1, DS3, and OCn special access products, and already dominate the market for backhaul of wireless traffic in Europe. Their offerings are completely scalable, and can be provisioned with almost no lead-time. Moreover, available data indicate that these offerings are poised for dramatic growth: fixed wireless providers now serve about 20 percent of all mobile base stations in the United States, but that percentage is expected to double in the next three to five years. New providers such as FiberTower, which holds high-bandwidth microwave licenses covering 99 percent of the

United States and already has contracts with six of the eight largest wireless carriers, are aggressively pursuing the expanding market for backhaul of wireless traffic. Sprint Nextel plans to use its extensive Broadband Radio Service ("BRS") spectrum holdings to provide WiMAX backhaul throughout its nationwide footprint by next year. Even wireline providers such as Covad have begun to deploy wireless transport links. Critically, these services have arisen almost entirely since the last comment cycle in this docket closed.

These new sources of competition in the high-capacity transmission market supplement those that had already developed between the Commission's issuance of the *Pricing Flexibility Order*[1] in 1999 and its opening of this docket in 2005. Facilities-based wireline providers have built robust and extensive fiber-optic networks in markets large and small, and have been using those networks to compete against incumbent LECs for years. In markets where the Commission has concluded that competitive deployment is truly infeasible, it has established unbundling rules – upheld by the courts – that guarantee competitive access to incumbents' facilities at TELRIC rates. Competitors also continue to enjoy unbundled access to DS1- and DS3-capacity loops and transport facilities throughout nearly all of Qwest's territory, not to mention voice-grade loops used to provide xDSL services that now surpass DS1 capacities. These providers are using Qwest's facilities to compete against the company for retail and wholesale customers, in both the mass and enterprise markets. In addition, intermodal

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[1] *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), *aff'd, WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

competitors, such as cable operators, have posed a strong challenge to telephone incumbents, using their nearly ubiquitous plant to enter markets nationwide.

Moreover, there is every indication that special access competition is on the brink of an ever greater surge. Exploding capacity needs – and end-user revenues – are revolutionizing the market, spawning creativity in point-to-point transport technology and further easing the economic burden associated with competitive deployment. By some estimates, the wireless backhaul market will more than triple between 2006 and 2010, as carriers transition from 2G networks to 3G and 4G networks, and their revenues grow accordingly. These wireless carriers will increasingly have both the reason and the means to construct or use competitive transmission networks.

Notwithstanding all of the above, some parties – chiefly certain wireless providers – claim that the Commission must reverse course on pricing flexibility. They suggest that pricing flexibility should be eliminated, not because they can demonstrate an absence of competition in the pertinent markets – which they cannot – but rather because they would simply prefer that the inputs which they choose to utilize were less expensive. This, of course, is no basis on which to deprive consumers of the real and tangible benefits they have enjoyed under the pricing flexibility regime. Under the legal framework for evaluating markets – which also has been refined since parties last updated this docket – competition is thriving throughout the high-capacity transmission markets, and especially in those areas satisfying the established pricing flexibility triggers. In any case, wireless providers' claims that special access is impeding competition are extremely curious, given the unparalleled success those providers have enjoyed in recent years.

In light of robust competition – past, present, and future – arguments for the elimination of pricing flexibility must be rejected. Alongside the Commission's other investment-oriented

policies, pricing flexibility has enhanced infrastructure deployment and reduced consumer prices. These, of course, are precisely the goals the Commission had in mind when it adopted the regime in 1999. Given the policy's success, and the state of competition, the Commission should continue to rely primarily on market forces to ensure that price cap LECs' special access rates remain just and reasonable. The Commission should retain the framework that it adopted in the *Pricing Flexibility Order*, and expand the scope of pricing flexibility with regard to certain types of services. In particular, the Commission should modify its product market definitions to account for the state of the high-capacity transmission market today, should extend Phase II pricing flexibility to all OCn-capacity offerings, and should extend Phase I flexibility to all markets, permitting open negotiation against the backdrop of tariffed rates.[2]

DISCUSSION

I. ANALYSIS OF THE HIGH-CAPACITY TRANSMISSION MARKET MUST BE GUIDED BY PREVIOUS LEGAL AND POLICY CONCLUSIONS REGARDING THE PROPER ASSESSMENT OF COMPETITION.

Parties seeking re-imposition of pervasive price-cap regulation state that prices are higher than they would like them to be, and ask the Commission to infer from their displeasure that the market is insufficiently competitive. An approach that *assumed* market failure on the basis of unsubstantiated claims of supracompetitive prices, however, would turn the appropriate inquiry

[2] In a separate docket, Qwest is seeking forbearance from all Title II and *Computer Inquiry* obligations with respect to (1) packet-switched services capable of providing speeds of 200 Kbps in each direction and (2) non-TDM optical networking, optical hubbing, and optical transmission services. *See* Qwest Petition for Forbearance, WC Docket No. 06-125 (filed June 13, 2006). Nothing in these comments should be understood to modify or supersede the relief Qwest seeks in that proceeding.

on its head. As the 2005 *NPRM*[3] and the recent *Public Notice*[4] both recognize, the Commission must begin by considering the state of competition in the market. That inquiry, moreover, must be guided by the federal courts' and the Commission's recent precedents regarding the proper evaluation of competitive conditions in telecommunications markets – particularly those regarding the significance of intermodal competition, the feasibility of competitive entry, the importance of *potential* as well as existing competition, and the costs imposed by economic regulation. The decisions the Commission has rendered with regard to these issues are central to its analysis here. Moreover, every one of these judgments has received the imprimatur of the federal courts, and the proponents of ubiquitous price-cap regulation have done nothing to call any of the precedents discussed into question.

A. The Commission Must Account for Intermodal Competitors.

The Commission's analysis of the market must account not only for traditional dedicated wireline facilities, but also for point-to-point services offered via other platforms and for the xDSL offerings that are increasingly relied on by small enterprise customers.[5] As the Commission and the courts have emphasized, this analytical framework best reflects the wide array of options presented to the sophisticated users that purchase special access services. Inclusion of these alternatives is also consistent with the principles of market analysis applied by

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[3] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994 (2005) ("*NPRM*").

[4] Public Notice, *Parties Asked to Refresh Record in the* Special Access Notice of Proposed Rulemaking, WC Docket No. 05-25, RM-10593 (rel. July 9, 2007) ("*Public Notice*").

[5] The details of this competition are described in detail in Part II.B of these comments.

the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") in the course of reviewing mergers.

Both the courts and the Commission have stressed the necessity of considering intermodal competitors in evaluating competition within a product market. In 2001's *USTA I* decision,[6] the D.C. Circuit vacated the Commission's 1999 *Line Sharing Order*[7] because that order (which required incumbent LECs to offer competitors unbundled access to the high-frequency portion of the loop, separate and apart from the low-frequency portion used to provide voice-grade service) failed to account for cable-based and other alternative providers of Internet access services. More broadly, the court directed the Commission to consider intermodal competition as part of a market's "competitive context."[8] Responding to *USTA I* in the *Triennial Review Order* ("*TRO*"), the Commission emphasized that intermodal wholesale services enhanced competition in both upstream markets (offering competitors another route toward obtaining wholesale capacity) and downstream markets (offering alternatives directly to the end user).[9] "[T]he Act," the Commission observed, "expresses no preference for the technology that carriers should use to compete."[10] Of particular note here, the Commission underscored the

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[6] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2001) ("*USTA I*").

[7] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999).

[8] *USTA I*, 290 F.3d at 428-29.

[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, 17044-45 ¶ 97 (2003) ("*TRO*"), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. Nat'l Ass'n. of Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

[10] *Id.*

relevance of intermodal deployment in its assessment of high-capacity loops and high-capacity inter-office transport (*i.e.*, the facilities used to provide special access "channel terminations" and "dedicated transport").[11] Evaluating the *TRO*, the D.C. Circuit "reaffirm[ed] *USTA I*'s holding that the Commission cannot ignore intermodal alternatives."[12] In the *Triennial Review Remand Order* ("*TRRO*"), the Commission again emphasized the role of intermodal competition.[13]

Since the *TRRO*, the Commission has on multiple occasions cited the explosion of intermodal competition as a basis for removing regulatory requirements. In the *Qwest Omaha Order* and the *ACS of Anchorage Order*, the Commission recognized that substantial cable-based retail competition in particular wire centers justified forbearance from various regulatory obligations with respect to loop and transport facilities.[14] In the SBC/AT&T, Verizon/MCI, and AT&T/BellSouth merger dockets, it relied in part on the extent of intermodal entry in rejecting concerns about post-merger competition in the mass and enterprise retail markets.[15] The

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[11] *See id.*, 18 FCC Rcd at 17162-63 ¶ 308 (loops); *id.* at 17230 ¶ 406 n.1256 (inter-office transport self-provisioning trigger), 17235 ¶ 415 n.1278 (inter-office transport competitive wholesale trigger).

[12] *USTA II*, 359 F.3d at 572-73.

[13] *See Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2589, 2598, 2628-29, 2638 ¶¶ 95, 113, 172, 194 (2005) ("*TRRO*"), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006), *reh'g denied* (Aug. 17. 2006).

[14] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, 19444 ¶ 59 (2005), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) ("*Qwest Omaha Order*"); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, 1960 ¶ 2 (2006), *appeals dismissed* (9th Cir. June 14, 2007) (Nos. 07-70898, et al.).

[15] *See, e.g., AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 5665 ¶ 3 (2007) ("*AT&T/BellSouth Merger Order*") ("Moreover, we note the rapid growth of intermodal competitors – particularly cable telephony providers (whether circuit-switched or voice over IP (VoIP)) – as an increasingly significant competitive force in this market, and we anticipate that such competitors likely will play an increasingly important role with respect to future mass market
(continued on next page)

Commission has also relied heavily on intermodal competition in the broadband market to relieve providers of wireline broadband Internet access from various rate-regulated network-sharing obligations.[16]

The Commission's express consideration of intermodal alternatives echoes the market-definition tools that the DOJ and the FTC employ in evaluating mergers. As stated in the Horizontal Merger Guidelines jointly produced by these agencies, "[m]arket definition focuses solely on demand substitution factors – *i.e.*, possible consumer responses" to a change in prices.[17] What matters is not whether the services at issue are identical, but rather whether consumers can and would treat them as effective substitutes in the event the price of one were to rise significantly. The Commission has summarized the Guidelines' approach as follows:

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competition."); *id.* at 5709 ¶ 83 ("[W]e find that intermodal competition from cable telephony and mobile wireless service providers, and providers of certain VoIP services will likely continue to provide [small enterprise] customers with viable alternatives."); *id.* at 5719 ¶ 106 (finding same for mass market); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18293, 18333, 18346 ¶¶ 3, 76, 101 (2005) ("*SBC/AT&T Merger Order*"); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18436, 18475, 18486 ¶¶ 3, 77, 97 (2005) ("*Verizon/MCI Merger Order*").

[16] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14856 ¶ 3 (2005) ("*Wireline Broadband Order*"); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21505 ¶ 22 (2004) ("*Broadband 271 Forbearance Order*"). In upholding the Commission's decision to remove network-sharing requirements arising from section 271, the D.C. Circuit found reasonable the Commission's determination "that 'any damage to broadband competition from denying unbundled access to the broadband capacities of hybrid loops is likely to be mitigated by the availability of loop alternatives or intermodal competition.'" *EarthLink v. FCC*, 462 F.3d 1, 5 (D.C. Cir. 2006) (internal citations omitted).

[17] *See* HORIZONTAL MERGER GUIDELINES § 1.0 (U.S. Department of Justice & Federal Trade Commission April 2, 1992, rev. April 8, 1997).

"[W]hen one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical."[18]

As this discussion makes clear, the Commission's analysis of the market must account for intermodal alternatives to incumbent LEC special access offerings. In Part II.B, we discuss these alternatives, with particular emphasis on new wireless competition. In Part V.B.1, we urge the Commission to modify its definition of the relevant product markets to account formally for these intermodal offerings. In today's converged environment, it simply makes no sense to speak of a "special access market" that accounts only for traditional wireline services. The market at issue in this proceeding is the market for high-capacity point-to-point telecommunications offerings. That market might appropriately be subdivided geographically or by capacity level, but not by the technological platform over which the service is provided.

B. The Commission Must Account for the Feasibility of Competitive Deployment.

As the Commission has determined repeatedly over the past several years, the revenue opportunities associated with broadband and high-capacity enterprise market facilities render competitive provision of such facilities economically feasible. These findings have been especially blunt with respect to: (1) the "entrance facilities" used to connect one provider's network to another provider's network, (2) the OCn-capacity links increasingly required by other providers as capacity needs grow, and (3) deployment in "greenfield" markets where the incumbent has never provided service as a regulated monopolist. The relative ease of self-

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[18] *Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations); (Transferors) and EchoStar Communications Corporation (a Delaware Corporation); (Transferee)*, 17 FCC Rcd 20559, 20605-06 ¶ 106 (2002) (subsequent history omitted).

deployment (especially when viewed in concert with the incipient explosion in the demand for higher-capacity offerings, discussed below in Part II.C) casts still further doubt on the utility of eliminating pricing flexibility in markets that are already home to competitive infrastructure.

Entrance Facilities: The Commission has expressly held that the facilities used to connect one network to another network can feasibly be replicated by competitors. In the Commission's words, these facilities "are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices."[19] Moreover, these facilities "often represent the point of greatest aggregation of traffic in a [competing carrier's] network," meaning that they "are more likely than dedicated transport between incumbent LEC offices to carry enough traffic to justify self-deployment."[20] Furthermore, because other providers have some degree of control over where they place their own network facilities – and therefore how much third-party transmission they require – they enjoy "a unique degree of control over the cost of entrance facilities."[21] Perhaps for these reasons, the Commission noted in the *TRRO* that carriers were "increasingly relying on competitively provided entrance facilities."[22]

OCn-Capacity Transmission Facilities: The Commission determined in the *TRO* that competitors were able to surmount any barriers to the deployment of OCn-capacity loops. Indeed, the record compiled there, some five years ago, "reflect[ed] competitive deployment of

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[19] *TRRO*, 20 FCC Rcd at 2610 ¶ 138.

[20] *Id.* at 2610-11 ¶ 138.

[21] *Id.* at 2611 ¶ 138.

[22] *Id.* at ¶ 139.

loops at the OCn level," even in Tier II and Tier III markets.[23] "[S]ervices offered over OCn loops produce revenue levels which can justify the high cost of loop construction, providing the opportunity for [competitors] to offset the fixed and sunk costs associated with the loop construction."[24] Furthermore, because these loops are frequently utilized by customers in multi-tenant commercial buildings, competitive providers are often able to use the fiber to serve multiple customers.[25] Thus, OCn-capacity loops were not subject to unbundling.[26] The Commission reached the same conclusions with respect to OCn-capacity interoffice transport.[27]

Broadband: Qwest's market evidence indicates that small and medium-sized businesses are increasingly using xDSL offerings, cable-modem services, and other types of broadband products formerly associated chiefly with the "residential" market. As described below,[28] these offerings now boast speeds often well in excess of those available over a DS1-capacity facility. Thus, in evaluating the state of competition in the market serving these smaller enterprises, the Commission must account not only for the economics of constructing DS1 links, but also for the feasibility of deploying these less costly alternatives. For many years, the Commission has recognized that the revenues associated with broadband offerings are robust, rendering competitive deployment economically feasible. In the *TRO*, the Commission found that there

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[23] *TRO*, 18 FCC Rcd at 17168 ¶ 315.

[24] *Id.* at 17169 ¶ 316.

[25] *Id.* at 17170 ¶ 318. These findings were so uncontroversial that no party challenged them during the ensuing litigation. *See USTA II*, 359 F.3d at 573 ("[The FCC] found that competing providers are not impaired without unbundled access to "OCn" transport facilities (very high-capacity transport facilities or bandwidths within such facilities), and all petitioners appear to accept that finding.")

[26] *See TRO*, 18 FCC Rcd at 17104-05 ¶ 202.

[27] *See id.* at 17221 ¶ 389.

[28] *See infra* Part II.A (xDSL), Part II.B.2 (cable).

was no need to require unbundled access to the portion of the copper loop's frequency used to provide xDSL (also known as "line sharing"), in large part because the costs of using an entire loop were "offset by the increased revenue opportunities" available from the provision of broadband service. Revenues would be even higher, the Commission recognized, in the case of fiber-fed broadband services.[29] The Commission has since cited "the ongoing introduction of new services and deployment of new facilities" as a basis for continued de-regulation.[30]

Greenfield Markets: As the Commission has recognized, the imposition of burdensome regulatory requirements on "incumbent" providers is especially inappropriate in areas where the "incumbent" has never provided service and therefore has no advantage over third parties. In these "greenfield" markets, "the entry barriers appear to be largely the same for both incumbent and competitive [providers] – that is, both incumbent and competitive carriers must negotiate rights-of-way, ... obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs."[31]

Though rendered in the context of local service provided to new housing developments, the Commission's conclusions with respect to greenfield deployment also apply in many cases to the links between wireless antennae and switching stations – *i.e.*, the links at the heart of claims raised by certain wireless providers in this docket. While these routes sometimes overlap with the incumbent's network, this is not always the case, because wireless antennae frequently are placed on remote towers far from the incumbent LEC's existing network. In fact, almost all new

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[29] *See TRO*, 18 FCC Rcd at 17144 ¶ 276 (noting that "the revenue opportunities associated with deploying any type of FTTH loop are far greater than for services provided over copper loops").

[30] *See Broadband 271 Order*, 19 FCC Rcd at 21505 ¶ 21.

[31] *TRO*, 18 FCC Rcd at 17143 ¶ 275.

cell sites are being built in areas not currently connected to the incumbent LEC's network. In those instances, the incumbent enjoys no relevant advantages in provisioning the facilities at issue. The Commission should recognize as much here, as it has done in the unbundling context.

C. The Commission Must Account for Potential, As Well As Existing, Competition.

Moreover, the Commission's recent assessments of market competition have recognized that one must account not only for existing competitive deployment, but also for the inferences that can be drawn from that deployment respecting the prospects for further deployment, both in the same market and in other, similar markets.

First, the Commission has recognized, in the special access context and elsewhere, that existing deployment demonstrates that other competitors can feasibly enter a market – or other, similar, markets – even when they have not yet done so. In *USTA II*, the D.C. Circuit had criticized the Commission's failure to account adequately for such potential competition.[32] The Commission responded to this criticism in the *TRRO*, adopting "an approach that relie[d] ... on the inferences that can be drawn from one market regarding the prospects for competitive entry in another," "account[ing] for actual and potential deployment by inferring from competitors' facilities deployment in one market the ability of a reasonably efficient competitor to enter another, similar market in an economic manner."[33] This approach was particularly salient in the context of high-capacity loops and transport links.[34] When the D.C. Circuit later upheld the

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[32] *See USTA II*, 359 F.3d at 575.

[33] *TRRO*, 20 FCC Rcd at 2558-59 ¶ 43.

[34] *See id.* at 2588-97 ¶¶ 93-110; *id.* at 2625-2629 ¶¶ 167-73.

TRRO, it placed great weight on the Commission's willingness to draw inferences from existing competition regarding the prospects for additional competition.[35]

More recently, the Commission has relied on inferences regarding the prospects for high-capacity transmission deployment to ground its determinations that competition would survive mergers of the existing providers. Evaluating the proposed mergers of SBC and AT&T, Verizon and MCI, and (later) AT&T and BellSouth, the Commission was faced with arguments (raised in some instances by Qwest) that the mergers would undermine competition in the wholesale wireline special access market. Among other things, commenters argued in each case that the company being acquired had advantages not shared by other competitors in the relevant markets, rendering the prospects for post-merger competition in the merged companies' regions unlikely. The Commission disagreed. In each order, it cited fiber-based collocation by third-party providers, but then made clear its view that *potential* competition was relevant as well. As the Commission stated in the *SBC/AT&T Merger Order* and the *Verizon/MCI Merger Order*:

> Even in those wire centers where [one of the merging parties] currently is the only collocated carrier, competitors after the merger are likely to have incentives to construct substitute collocations. The extensive local fiber networks already deployed by other competitors in [the merging companies'] territory indicate that these competitors are likely to find it both technically and economically feasible to construct additional collocations.[36]

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[35] *Covad v. FCC*, 450 F.3d 528, 540-41 (D.C. Cir. 2006) (providing 15 citations of language in *TRRO* emphasizing Commission's reliance on inferences).

[36] *SBC/AT&T Merger Order*, 20 FCC Rcd at 5687 ¶ 44; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18455 ¶ 44. The Commission used the same language with one minor alteration (removal of the words "both technically and economically") in its *AT&T/BellSouth Merger Order*. *See AT&T/BellSouth Merger Order*, 22 FCC Rcd at 18313 ¶ 51.

Thus, as the Commission evaluates competition in the high-capacity transmission market here, it must recognize that existing competition demonstrates the feasibility of additional competition going forward, even in the face of future market consolidation.

Furthermore, the Commission has also recognized that in a rapidly expanding market, incipient competition can and should influence any assessment of competition even apart from the inferences that may be drawn from existing deployment in a particular area. In the *Broadband 271 Forbearance Order*, the Commission relied explicitly on "potential" competition in the retail broadband market to justify relief from section 271's network-sharing requirements.[37] Similarly, in the *Wireline Broadband Order*, the Commission rejected arguments that the broadband market must be assessed solely on the basis of extant competition. Criticizing arguments "premised on data that are both limited and static," the Commission emphasized that "a wide variety of competitive and potentially competitive providers and offerings [were] emerging in this marketplace," and concluded that such a market "is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve."[38]

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[37] *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505 ¶ 21 ("[T]he developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities, leads us to conclude that the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest"); *id.* at 21505-06 ¶ 22 ("[A]ctual and potential intermodal competition informs rational competitors' decisions concerning next-generation broadband technologies"). In the course of upholding the *Broadband 271 Forbearance Order*, the D.C. Circuit affirmed the Commission's conclusion that reliance on potential competition was appropriate. *See EarthLink*, 462 F.3d at 11.

[38] *Wireline Broadband Order*, 20 FCC Rcd at 14880-81 ¶ 50.

Put simply, although the high-capacity transmission market is highly competitive at this moment, the Commission cannot and should not limit its inquiry to the current state of the market. Widespread competitive deployment indicates the feasibility of competitive deployment elsewhere. Moreover, in a market such as this, which (as described below) is in the midst of revolutionary expansion, the Commission must also account for *incipient* competition – just as it has done in the very similar market for *residential* high-capacity ("broadband") offerings.

D. The Commission Must Account for the Pernicious Effects of Unnecessary Economic Regulation.

Finally, as it evaluates the high-capacity transmission market with the above guideposts in mind, the Commission must also remain cognizant of the real and serious harms that can arise when a competitive market is subjected to price regulation. Time and again, the Commission has explained that "rate regulation can only be, at best, an imperfect substitute for market forces."[39] Such regulation "cannot replicate the complex and dynamic ways in which competition will affect the prices, service offerings, and investment decisions of both incumbent LECs and their competitors."[40]

Regulated rates that fail (as they must) to replicate the prices that would be derived by a competitive market visit real and substantial harms on consumers. This is just as true of rates that are unnaturally low as it is with respect to rates that are too high. The Commission has expressed its "aware[ness]" that below-market pricing requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new

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[39] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, 12 FCC Rcd 15982, 16107 ¶ 289 (1997) (emphasis added).

[40] *Id.*

technology."[41] First, of course, such prices deter investment by the incumbent, which knows it will not be able to recover the market value (or even the cost) of its investment, and that competitors will indeed be able to use its facilities at below-market rates to compete against it. Second, below-market prices deter competitive deployment of next-generation facilities and innovative service offerings: If the incumbent's price is too low, there will be little reason for a competitor to invest its own capital, and little hope for significant returns on any investment it would make, given that still other competitors will be relying on the incumbent's underpriced offering.[42] This dynamic saps the market of any incentive for innovation, either by the incumbent or by competitors, and deprives customers of related benefits.

In short, by deterring investment by incumbents and competitors alike, regulation often *undermines* facilities-based competition. This is true not only with regard to TELRIC rates, but also with respect to regulated rates meant to track those available in the market. For example, the Commission determined that section 271 network access requirements, which required Bell Operating Companies to offer certain broadband elements at "just and reasonable" rates,[43] exerted "disincentive effects ... on BOC investment" and thus forbore from application of those requirements.[44] Similarly, in the 2005 *Wireline Broadband Order*, the Commission removed network-sharing obligations arising from the *Computer Inquiry* decisions, which it found

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[41] *TRO*, 18 FCC Rcd at 16984 ¶ 3.

[42] *See id.* at 17149-50 ¶¶ 288, 290.

[43] *Id.* at 17386 ¶ 656.

[44] *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505 ¶ 21. As the D.C. Circuit recognized in upholding the *Broadband 271 Forbearance Order,* the Commission's decision provided "incentives for both ILECs and CLECs to invest in and deploy broadband facilities, which will increase competition going forward and thereby keep rates reasonable, benefit consumers, and serve the public interest." *See EarthLink*, 462 F.3d at 7.

"constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services."[45] In all, therefore, the effect of price regulation in a competitive market is to *contradict* the Act's principal goal – which, in the words of the D.C. Circuit, was "to stimulate competition – *preferably genuine, facilities-based competition.*"[46]

These principles apply directly to the inquiry at hand. "Like all price regulation, the Commission's price cap system is an imperfect substitute for actual competition. LEC price cap regulation should continue only until competition emerges in the interstate access market."[47] As the Commission recognized in the *Pricing Flexibility Order*, price cap regulation involves "significant regulatory constraints," and, as the market becomes more competitive, such constraints become "counter-productive."[48] In markets for high-capacity transmission services, there are substantial differences among customers. Prices in competitive markets should reflect these differences and, in metropolitan areas with substantial competitor-owned fiber, an absence of tiered pricing for special access services would be contrary to the efficient development and operation of these markets. In a market economy, tiered pricing plans (such as term and volume discounts) play a critical role in the development and maintenance of efficient markets by better aligning prices with costs. There are two fundamental reasons for the prevalence of term and volume discounts in our economy: (1) commitments to longer terms and larger volumes

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[45] *Wireline Broadband Order*, 20 FCC Rcd at 14865 ¶ 19.

[46] *USTA II*, 359 F.3d at 576 (emphasis added).

[47] *Price Cap Performance Review for Local Exchange Carriers; Treatment of Operator Services Under Price Cap Regulation; Revisions to Price Cap Rules for AT&T*, 11 FCC Rcd 858, 869-70 ¶ 21 (1995).

[48] *Pricing Flexibility Order*, 14 FCC Rcd at 14232-33 ¶ 19.

decrease costs on both sides of transactions; and (2) discounts based on terms and volumes provide accepted and easy to understand means of sharing these cost savings between suppliers and their customers. Thus, "[p]rohibiting incumbent LECs from offering volume and term discounts could distort the market for access services by preventing them from competing efficiently."[49]

The Commission should give great weight to the harms associated with price regulation before re-imposing burdensome price-cap requirements in areas subject to pricing flexibility – and should consider these harms as well when assessing proposals to *expand* pricing flexibility. What matters in this proceeding is *not* whether the current regulatory framework is as advantageous as possible from the perspective of competitive LECs or wireless providers (or, for that matter, Qwest, which sells transmission capacity within its region but is also a substantial purchaser of capacity outside its region), but rather what regime would most benefit *consumers*. Given the demanding criteria set forth in the *Pricing Flexibility Order* and the dramatic growth in intra- and inter-modal competition (described in Part II, below), the potential harm associated with pervasive price-cap regulation is far greater than any purported potential benefits.

II. THE HIGH-CAPACITY TRANSMISSION MARKET IS ROBUSTLY COMPETITIVE AND BECOMING MORE SO.

The high-capacity transmission market is extremely competitive and continues to blossom. Qwest and similar companies face stiff competition from facilities-based wireline providers, not only in the OCn- and DS3-capacity markets but also in the provision of DS1-capacity circuits and their substitutes. In those markets where the Commission has found that providers cannot either economically self-provision high-capacity facilities or obtain use of such

[49] *Id.* at 14289 ¶ 124.